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85-1646

No.———

In The

Supreme Court of the United States

October Term, 1985

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RALPH KEMP, WARDEN,

Petitioner,

v.

JOSEPH WILSON, JR.,

Respondent.

———o———

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

———o———

PETITION FOR A WRIT OF CERTIORARI

———o———

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QUESTION PRESENTED

I.

Did the Eleventh Circuit Court of Appeals err in concluding that the argument of the prosecutor at the sentencing phase precluded the jury from considering mercy and did the opinion of the Eleventh Circuit contradict the holdings of this Court in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) and *Caldwell v. Mississippi*, — U.S. —, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)?

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PETITION FOR A WRIT OF CERTIORARI

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The Petitioner, Ralph Kemp, respectfully prays that a writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on November 18, 1985 and the subsequent denial of a timely motion for rehearing on February 10, 1986.

———o———

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported in *Wilson v. Kemp,* 777 F.2d 621 (11th Cir. 1985), and is included as Appendix B to the instant petition. The decision of the United States Court of Appeals

for the Eleventh Circuit denying the petition for rehearing and suggestion for rehearing *en banc* was entered on February 10, 1986. (Appendix C). The opinion of the district court granting habeas corpus relief is not reported but is included as Appendix A to the instant petition.

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JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on November 18, 1985 and a timely suggestion for rehearing *en banc* was denied on February 10, 1986. This petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

———o———

STATEMENT OF THE CASE

The Respondent, Joseph Wilson, Jr., was convicted of murder, kidnapping with bodily injury and possession of a firearm during the commission of a crime in the Superior Court of Forsyth County, Georgia, on August 16, 1979. Respondent was sentenced respectively to death, life imprisonment, and five years imprisonment, said sentences to be served consecutively.

Respondent then filed a direct appeal to the Supreme Court of Georgia. That court affirmed the convictions and sentences and this Court denied a petition for a writ of certiorari. *Wilson v. State*, 246 Ga. 62, 268 S.E.2d 895 (1980), *cert. denied*, 449 U.S. 1103 (1981).

Respondent then filed a petition for habeas corpus relief in the Superior Court of Butts County, Georgia. On September 21, 1981, that court entered an order in which it granted relief as to the conviction and sentence for the possession of a deadly weapon during the commission of a crime, but denied relief as to the remaining convictions and sentences. The Supreme Court of Georgia subsequently affirmed the decision of the state habeas corpus court as to the murder and kidnapping with bodily injury convictions and sentences. *Wilson v. Zant*, 249 Ga. 373, 290 S.E. 2d 442 (1982). This Court denied a petition for a writ of certiorari on December 13, 1982.

On June 17, 1983, Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia. On May 16, 1984, the district court entered an order granting relief as to the death sentence, but denying relief as to the conviction. Judgment was entered by the court on May 22, 1984. Af-

ter a motion for clarification of judgment was filed, the district court entered an order on June 1, 1984, directing that the judgment be corrected. A new judgment was entered dated June 4, 1984.

The Petitioner in the instant case filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit. On November 18, 1985, a panel of that court issued an opinion affirming the decision of the district court in its granting of habeas corpus relief as to the death sentence. *Wilson v. Kemp*, 777 F.2d 621 (11th Cir. 1985). A timely petition for rehearing and suggestion for rehearing *en banc* were denied on February 10, 1986.

———o———

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS IMPROPERLY CONCLUDED THAT THE ARGUMENT OF THE PROSECUTOR IN THE INSTANT CASE RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL TO THE RESPONDENT.

Both the district court and the Eleventh Circuit Court of Appeals found the argument of the prosecutor at the sentencing phase in the instant case to be constitutionally impermissible. The Eleventh Circuit Court of Appeals focused on two particular portions of the argument of the prosecutor and found that the effect was prejudicial.

The first portion of the argument examined by the Eleventh Circuit Court of Appeals pertains to a quote by the prosecutor from the Georgia case of *Eberhart v. State*,

47 Ga. 598, 609-10 (1873). In the instant case, the prosecutor did not attribute the quote to the Supreme Court of Georgia, but simply attributed it to a noted legal scholar. The Eleventh Circuit Court of Appeals also took issue with the prosecutor's partial quote from *Gregg v. Georgia*, 428 U.S. 153 (1976).

Petitioner submits that a consideration of the argument of the prosecutor as a whole and in the context of the trial as a whole shows that the argument did not render the Respondent's trial fundamentally unfair. Thus, the decision by the Eleventh Circuit Court of Appeals does not comply with this Court's holding in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

In its opinion, the Eleventh Circuit Court of Appeals effectively concluded that the prosecutor, in reading the passage from *Eberhart v. State, supra*, removed mercy as a consideration from the jury. The panel did not see any difference in the fact that the prosecutor did not attribute the sentiments in the quote to the court; however, the Supreme Court of Georgia specifically has noted that "it would have not been improper for the district attorney merely to have expressed to the jury the sentiments invited in the quote from *Eberhart, supra.*" *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833 (1977).

In *Caldwell v. Mississippi*, — U.S. —, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), this Court considered the argument of a prosecutor at the sentencing phase of a bifurcated capital case. In that case, this Court did conclude that the argument rendered the sentencing hearing fundamentally unfair. The prosecutor had essentially presented an argument that "led the jury to believe that responsibility for

determining the appropriateness of the death sentence lay elsewhere. . . . the prosecutor argued to the jury that, if it were to return a sentence of death, the decision would automatically be reviewed by the Supreme Court." *Kirkpatrick v. Blackburn*, 777 F.2d 272, 284 (5th Cir. 1985). The effect of the argument by the prosecutor was actually to minimize the sense of importance of the jury and its role in the case.

A review of the argument of the prosecutor in the instant case relating to the sentiments expressed in *Eberhart v. State* shows that the prosecutor's comments were not designed to shift the burden of decision from the jury or to shift the focus of the jury away from its role in the sentencing process. Rather, the prosecutor was simply urging the jury to base its decision on the facts of the instant case.

> There is nothing wrong with urging a capital sentencing jury to disregard emotion and render a decision based on law and the facts. . . . I do not understand the Court to believe that emotions in favor of mercy must play a part in the ultimate decision of a capital sentencing jury. Indeed, much of our Eighth Amendment jurisprudence has been concerned with eliminating emotion from sentencing decisions.

Caldwell v. Mississippi, — U.S. —, 105 S.Ct. 2633, 2650 (1985) (Rehnquist, J., *dissenting*). Petitioner thus submits that under Georgia law and federal constitutional principles, there was nothing fundamentally unfair in arguing to the jury that their verdict at the sentencing phase should not be based on "sickly sentimentality." The argument simply asserted that there should also be mercy towards society and the victim of the crime as well as towards the defendant.

As to the argument of the prosecutor made based on *Gregg v. Georgia, supra,* a reading of the entire argument shows that the prosecutor was setting forth the various functions of capital punishment. The prosecutor was arguing in favor of retribution as an aspect of capital punshment. The reference from *Gregg v. Georgia, supra,* is clearly a reference to retribution and not capital punishment in general. Thus, the quotation did not serve to overemphasize the "function" of capital punishment in our society.

Petitioner submits that the Eleventh Circuit Court of Appeals in the instant case has taken two portions of the prosecutor's argument and concluded that this renders the sentencing phase fundamentally unfair. A review of the entire argument and the entire trial clearly shows that the Respondent did not receive a fundamentally unfair trial and that habeas corpus relief was not warranted in the instant action.

———o———

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the decision by the Eleventh Circuit Court of Appeals and to reconsider the application of *Donnelly v. DeChristoforo, supra,* to the arguments of a prosecutor in a sentencing phase of a trial.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

CIVIL NO. C-83-93-G

JOSEPH WILSON, JR.

VERSUS

RALPH KEMP, Warden

O R D E R

Presently pending before the court is petitioner's application for a writ of habeas corpus in this action brought pursuant to 28 U.S.C. § 2254. Convicted of murder, kidnapping with bodily injury and unlawful possession of a firearm during the commission of a crime, petitioner was sentenced by the Superior Court of Forsyth County, *inter alia*, to die by electrocution. Currently petitioner claims his incarceration is unconstitutional on eighteen grounds. Since the Georgia courts utilize a bifurcated trial procedure when the prosectuor is seeking a sentence of death, the court will first address the allegations of error that allegedly occurred during the guilt-innocence phase of trial. Then the court will examine the issues relating to the sentencing phase.

First, petitioner claims that the introduction of his statement given to police during custodial interrogation, after he had requested an attorney but before one was provided, violated his fifth, sixth and fourteenth amendment rights to counsel. Applying the principle enunciated in *Edwards v. Arizona*, 451 U.S. 477, 487 (1981), the Supreme

Court of Georgia concluded that "defendant's statement, given pursuant to police initiated custodial interrogation after the defendant invoked his right to counsel, was inadmissible at trial during the state's case in chief." *Wilson v. Zant*, 249 Ga. 373, 376-77 (1982). Nevertheless, the supreme court found this error was harmless beyond a reasonable doubt and denied petitioner's application for a writ of habeas corpus. *Id.* at 377.

Recently the Supreme Court of the United States decided that *Edwards* should not be applied retroactively. *See Solem v. Stumes*, —U.S. —, — S.Ct. —, 79 L.Ed.2d 579, 587 (1984). Since *Edwards* was decided approximately 21 months after petitioner's trial, this court concludes that *Edwards* is not applicable to the facts in this case. Therefore, the court finds that the allegation that petitioner's statement was inadmissible under *Edwards* fails to state a claim upon which this court may grant relief. Accordingly, the petition for habeas corpus relief is denied on this basis.

As a separate ground for relief, petitioner alleged that introduction of evidence derived from his statement was erroneous and violated his right to a fair trial. Having found that the admission of petitioner's statement into evidence did not state a claim upon which this court can grant relief, the court likewise finds that the admission of other evidence allegedly derived from the statement did not contravene petitioner's constitutional rights. *See Jameson v. Wainwright*, 719 F.2d 1125, 1126 (11th Cir. 1983) (to obtain habeas corpus relief because of an evidentiary ruling, petitioner must demonstrate that the ruling resulted in a denial of fundamental fairness).

In the alternative, petitioner claims that two jury instructions impermissibly shifted the government's burden of proof to him during the guilt-innocence phase of trial. *See Sandstrom v. Montana,* 442 U.S. 510, 517 (1979) (when a charge instructs the jury to presume the presence of an element of a crime, the instruction impermissibly relieves the state's burden of proving guilt beyond a reasonable doubt). When examining the challenged instructions, this court must determine whether any "reasonable juror could have given the presumption conclusive or persuasion-shifting effect." *Id.* at 519.

It is well settled that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146-47 (1973); *Lamb v. Jernigan,* 683 F.2d 1332, 1339 (11th Cir. 1982). To determine whether the jury could have interpreted a particular charge as burden-shifting, the court must "take the instruction as a whole, pay careful attention to the words actually spoken to the jury and examine the charge from the prospective of a reasonable juror." *Patterson v. Austin,* 728 F.2d 1389, 1393 (11th Cir. 1984). The proper focus is not on whether the trial court failed to isolate and cure a particular instruction, but rather on "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten,* 414 U.S. at 147. This approach requires the court to consider the effect of even patently erroneous instructions in light of the remainder of the charge and the entire trial. *Corn v. Zant,* 708 F.2d 549, 559 (11th Cir. 1983).

In *Sandstrom,* the Supreme Court explained a three prong test for determining whether a particular instruc-

tion violated a petitioner's right to due process. *Sandstrom v. Montana,* 442 U.S. at 514-26. First the court must determine the nature of the presumption described by the jury instruction. *Id.* at 514. If the court finds that the charge is a mandatory rebuttable presumption, then it is required to determine whether the presumption shifts the burden of proof on an essential element of the crime in issue. *Id.* at 521. Finally, the court is required to determine whether the instruction under the circumstances can pass constitutional muster. *Id.* at 523. *See also Franklin v. Francis,* 720 F.2d 1206, 1210 (11th Cir. 1983).

In the instant case the trial court instructed the jury that "[i]ntent may be inferred from proven circumstances, or as I have said, by acts, conduct, demeanor and motive, or it may be presumed, when it is the natural and necessary consequences of the act for which the defendant is being prosecuted." T-1198-99. Interpreting an almost identical instruction which provided that intent "may be inferred . . . from proven circumstances or by the acts and conduct of the defendant," the Eleventh Circuit found that this statement was merely another way of explaining that the jury may rely on circumstantial evidence in finding intent. *Lamb v. Jernigan,* 683 F.2d 1332, 1339 (11th Cir. 1982). Likewise, the corresponding portion of the instruction at bar does not suggest that the burden of proof was on the accused rather than on the prosecutor or that circumstantial evidence need not convince the jury of the accused's intent beyond a reasonable doubt.

The court also found the second portion of the charge which provided that intent "may be presumed when it would be the natural and necessary consequence of the particular acts" was also permissive. *Id.* at 1340. Com-

paring the ambiguous directive "the law presumes that" contained in the *Sandstrom* and *Mason* charges with the language "may be presumed," the court found that the instruction in issue was unlikely to be interpreted by reasonable jurors as requiring them to draw an inference of intent. *Id.* The court also concluded that the permissive language would also tend to prevent reasonable jurors from viewing the presumption as conclusive or irrebuttable. *See id.* ("Having been told that they *might* infer intent from certain types of evidence reasonable jurors would not likely conclude that they were entitled to do so in the face of convincing contradictory evidence") (emphasis in original). Even if the instruction could have been understood as allowing the jury to make an irrebuttable inference of intent, the Eleventh Circuit declared that the term "necessary" limited the acts from which the jury could draw the conclusive inference. *Id.* Following this reasoning, the court is compelled to conclude that this instruction given during petitioner's trial was not reasonably susecptible of the interpretation proffered by petitioner. Therefore, the petition for habeas corpus relief is denied on this basis.

The second instruction challenged by petitioner provided as follows:

> If a person is killed by another, by an instrument, [and] the manner in which it was used was one likely to produce death, and at the time of the killing there were no circumstances such as to excite the fears of a reasonable man that he was in danger from the deceased, then the law will imply malice on the part of the defendant, and you would be authorized to find him guilty of murder, as charged in the indictment.

T-1195.

Applying the *Sandstrom* test, this court must first determine whether the instruction created a mandatory or permissive presumption. The language "the law will imply malice" is a mandatory presumption because a reasonable juror could have concluded that upon finding the basic facts (the deceased was killed by another person with an instrument in a manner likely to produce death), he must find the ultimate fact of malice unless the petitioner had proven there were some circumstances justifying a reasonable man's expectation of danger from the deceased. In addition, the record is devoid of any language indicating that the mandatory presumption could be rebutted. Therefore, this court concludes that the malice instruction was constitutionally impermissible under *Sandstrom*. *See Sandstrom v. Montana*, 442 U.S. at 523.

Even when an instruction impermissibly shifts the burden of proof on an element of the crime to the defendant, the error may be considered harmless when the instruction shifts the burden of proof to the defendant with respect to an element of the crime not at issue in the case. *See Mason v. Balkcom*, 669 F.2d 222, 227 (5th Cir. 1982) (Unit B).

The sole defense proffered by petitioner at trial was an alibi defense which stated that petitioner was at home with his family at the time the victim allegedly was killed by a gunshot wound to his head. In *United States v. Frady*, 456 U.S. 152 (1982), the Supreme Court found that an erroneous jury charge on malice could not have affected the jury's decision to convict the defendant because he "presented no evidence whatever of mitigating circumstances, but instead defended by disclaiming any involvement with the killing." *Id.* at 174. Likewise, in *United*

States v. Reeves, 594 F.2d 536, 541 (6th Cir. 1979), the court affirmed the defendant's conviction on the basis that the burden-shifting instruction on intent could not have affected the jury's decision to return a verdict of guilty when the defendant's sole defense was one of mistaken identification.[1]

When a defendant defends a criminal charge solely on the basis of an alibi, the jury's first function is to determine whether the defendant was in fact the perpetrator of the crimes charged in the indictment. If the jury rejects the defendant's alibi, the jury must determine whether the state has satisfied its burden of proving beyond a reasonable doubt that petitioner committed the offenses charged in the indictment. In this case it is clear that the jury found credible the circumstantial evidence which placed petitioner at the scene of the crime because they found him guilty of not only murder but also kidnapping. In addition, petitioner's testimony was impeached not only by the testimony of others, but also by his own prior inconsistent statements. Equally clear is the fact that the record is devoid of any extenuating circumstances which would have made petitioner fear for his life while in the presence of the victim. Rather, the state introduced overwhelming evidence that the victim was unarmed, was taken into a deserted field and suffered a gunshot wound to the head at close range after petitioner had made various threats to "blow [the victim's] . . . brains out." Since malice was not a controverted issue in this case, the court finds that the burden-shifting instruction on malice was harmless beyond a reasonable doubt. In the alternative, the court finds that "the evidence of guilt is so overwhelming that the error could not have been a contributing factor in the

jury's decision to convict." *Mason v. Balkcom,* 669 F.2d 222, 227 (5th Cir. 1982) (Unit B). Therefore, the writ of habeas corpus is denied on this basis.

Petitioner also contends that his rights under the *Brady* doctrine were contravened because his trial counsel was not provided copies of statements by three witnesses at trial. There are four situations in which *Brady* is applicable: (1) the prosecutor has not disclosed information despite a specific defense request; (2) the prosecutor has not disclosed information despite a general defense request for all exculpatory information or without any defense request at all; (3) the prosecutor knows or should know that the conviction is based on false evidence; (4) the prosecutor fails to disclose purely impeaching evidence not concerning a substantive issue, in the absence of a specific defense request. *Maddox v. Montgomery,* 718 F.2d 1033, 1035 (11th Cir. 1983).

In this case the Supreme Court of Georgia expressly found that the three statements were made available to petitioner's trial counsel. This court is bound by the state court's findings of fact, unless a petitioner can demonstrate one of the exceptions listed in 28 U.S.C. § 2254(d) is applicable. *Thomas v. Zant,* 697 F.2d 977, 986 (11th Cir. 1983). Petitioner has failed to satisfy this burden on this issue. Since the statements were made available to petitioner's trial counsel, the court finds that he has failed to establish a claim upon which habeas corpus relief can be granted on this basis. Moreover, the Second Circuit recently concluded that the delay of producing, rather than the suppression of, *Brady* material is not sufficient to reverse a defendant's conviction unless he demonstrates prejudice from the delay because a defendant has various

alternative remedies available at trial, which include moving for a continuance, recalling witnesses, and presenting rebuttal evidence. *See United States v. Mourad*, 729 F.2d 195 (2d Cir. 1984). Since petitioner's trial counsel was permitted to read the statements and to make notes from them, this court cannot find that petitioner has suffered prejudice. Therefore, the writ of habeas corpus is denied on this basis.

During closing arguments at the guilt-innocence phase of trial, the prosecutor commented on petitioner's failure to produce evidence and witnesses to corroborate his alibi defense. Specifically, the prosecutor referred to the failure of the defendant to produce evidence of any other person fitting petitioner's description who might have abducted the victim of any person, present at the party from which the victim was abducted, who did not hear petitioner utter threats against the victim. The prosecutor argued that if such evidence to support the alibi defense existed, petitioner's counsel would have produced the evidence.

Under Georgia law, a prosecutor may argue to the jury the inferences to be drawn from the accused's failure to present witnesses who are competent to testify and who allegedly would give evidence favorable to the defendant. *Shirley v. State*, 245 Ga. 616, 618 (1980); *Contreras v. State*, 242 Ga. 369, 372 (1978). While recognizing this principle of law, petitioner asserts that his procedural due process and equal protection rights have been violated because an accused cannot comment on the state's failure to produce witnesses under Georgia law. *See Brown v. State*, 150 Ga. App. 831, 832-33 (1979).

Petitioner's trial counsel did not attempt to argue that the state had additional witnesses who did not appear

at trial. Therefore, this court finds that petitioner lacks standing to assert the above claims of a denial of due process or equal protection in this habeas corpus proceeding. Therefore, the application is denied on this basis.[2]

Asserting that excusal for cause based upon a juror's opposition to the death penalty creates a prosecution-prone jury, petitioner asserts that he is entitled to habeas corpus relief in this action.[3] This argument has been repeatedly rejected by the courts in this circuit. *See e.g., Spencer v. Zant,* 715 F.2d 1562, 1577 (11th Cir. 1983); *Corn v. Zant,* 708 F.2d 549, 565 (11th Cir. 1983); *Spinkellink v. Wainwright,* 578 F.2d 582, 597 (5th Cir. 1978). Since this court is bound by the above precedent, the court denies petitioner's application for a writ of habeas corpus on this ground.

Finally, petitioner argues that the evidence introduced at trial was insufficient to sustain his conviction. Therefore, he seeks collateral relief pursuant to *Jackson v. Virginia,* 443 U.S. 307 (1979). The Supreme Court in *Jackson* determined that a federal court, in reviewing the sufficiency of the evidence, must decide whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt of the crime charged in the indictment. *Id.* at 324. *See also Martin v. Alabama,* No. 83-7215, slip op. at 2785 (11th Cir. April 23, 1984) (discussing *Jackson*).

With respect to the guilt-innocence phase of trial, petitioner contends that the admission of his statement and the evidence allegedly derived from the statement was erroneous. Except for that evidence, he contends the state did not introduce sufficient testimony to sustain the conviction. Having determined previously that petitioner's

claims premised upon an *Edwards* violation are without merit, the court concludes that petitioner has failed to establish that the overall evidence was insufficient for a rational juror to find that petitioner was guilty of the crimes charged in the indictment.

During petitioner's trial two witnesses testified that a few hours prior to the time of the victim's death, petitioner, while holding a shotgun and a shotgun shell, stated that he was going to "blow away" the deceased. Three persons witnessed petitioner's abducting the unarmed victim at gunpoint. Further, one witness testified that petitioner telephoned her later in the evening and told her that the victim was "taken care of" and that she should dispose of the victim's jacket. The sole defense proffered by petitioner was an alibi that he was at home when the homicide allegedly occurred. Although this alibi was corroborated by petitioner's wife and minor daughter, their testimony and petitioner's credibility were impeached on cross examination by the prosecuting attorney. Without considering the evidence allegedly admitted in violation of *Edwards*, the court finds that there is sufficient evidence in the record to sustain the verdicts of guilty. The court therefore concludes that petitioner has failed to establish that his conviction should be collaterally attacked on the basis of *Jackson v. Virginia*, 443 U.S. 307 (1979).

With respect to the sentencing phases of trial, petitioner has advanced several claims including, *inter alia*, that the prosecutor's remarks during closing arguments so inflamed the passion of the jury that petitioner was denied a fundamentally fair sentencing phase of trial. In the presence of the jury but addressing the court, the

prosecutor read excerpts from *Gregg v. Georgia,* 428 U.S. 153 (1976) and *Eberhart v. State,* 47 Ga. 598, 610 (1872).[4] He attributed these passages to the United States Supreme Court and to a "noted legal scholar in the 1800's" respectively.

Several courts have previously addressed the propriety of reading various passages from death penalty cases to the jury during the sentencing phase of trial. In 1978 the Supreme Court of Georgia disapproved the reading of the identical passage from *Eberhart* because "the district attorney's attribution of these sentiments to a justice of this court with the object of influencing the jury to impose the death penalty was improper." *Hawes v. State,* 240 Ga. 327, 336 (1978). Noting this position by the supreme court, the court in *Potts v. Zant,* 575 F.Supp. 374 (N.D.Ga. 1983) concluded that the prosecutor's reading of passages from *Gregg* and *Eberhart* during closing arguments in the penalty phase unjustifiably violated the petitioner's constitutional rights. *Id.* at 388-89 ("There was no point in reading the [selected passages to the Court. . . . [T]hey were clearly intended to influence the jury despite counsel's representations to the contrary, and being cases from eminent benches, read with the apparent approval of the Court where the jury could observe and hear, could be expected to influence them—towards death, not life imprisonment."). Therefore, the district court granted the application for a writ of habeas corpus in *Potts.*

The Eleventh Circuit has also declared that "it is most important that the sentencing phase of trial not be influenced by passion, prejudice or any other arbitrary factor." *Hance v. Zant,* 696 F.2d 940, 951 (11th Cir.), *cert.*

denied, 103 S.Ct. 3544 (1983). Acknowledging this precedent and accepting the reasoning articulated in *Hawes* and *Potts,* the Eleventh Circuit recently concluded when "statements are so prejudicial that they would invalidate a sentencing hearing when made directly to a jury, they become no more constitutionally acceptable when uttered in the jury's presence but addressed to the judge regardless of whether they comport with state procedural rules." *Drake v. Francis,* 727 F.2d 990, 996 (11th Cir. 1984). Examining the identical *Eberhart* passage and references to other cases, the Eleventh Circuit in *Drake* held that "the prosecutor's closing remarks during the sentencing hearing . . . so inflamed the passions and prejudices of the jury that [the petitioner's] death penalty must be vacated and the cause remanded for resentencing." *Id.* at 996. Accordingly, since the prosecutor in the case at bar not only read the designated passages to the jury but also buttressed his position by attributing at least one passage to the United States Supreme Court, this court must find that petitioner is entitled to habeas corpus relief on the sentencing phase of the trial.

When an error of constitutional dimension affects only the sentencing phase of a criminal defendant's trial, a petitioner's habeas corpus relief is limited to a new trial only on the issue of punishment. *Tucker v. Francis,* 723 F.2d 1504, 1506 (11th Cir. 1984). Therefore, the state is hereby directed to retry petitioner on the sentencing phase of trial within a reasonable period of time. Having determined that petitioner is entitled to habeas corpus relief on the above ground, the court finds that no discussion is necessary on the other grounds asserting irregularities in the sentencing phase of trial.

In summary, the court grants petitioner's application for a writ of habeas corpus with respect to the sentencing phase of trial.

IT IS SO ORDERED this 16th day of May, 1984.

/s/ William C. O'Kelley
United States District Judge

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[1] Courts in this circuit have cited *Reeves* with approval. *See e.g.,* Patterson v. Austin, 728 F.2d at 1395 (11th Cir. 1984); Mason v. Balkcom, 669 F.2d 222 227 (5th Cir. 1982) (Unit B).

[2] Pretermitting the issue of standing, the Supreme Court of Georgia viewed petitioner's arguments as giving rise only to an equal protection claim. If petitioner had standing, this court would agree with the supreme court's reasoning in Wilson v. Zant, 249 Ga. at 384-87.

[3] It is important to note that petitioner does not challenge the excusal for cause of any particular juror.

[4] Petitioner challenges the following remarks:

> We would like to call the Court's attention to what is generally considered among legal scholars, and anyone who had given much thought to the subject, to the four generally accepted reasons for punishment.
>
> The first is retribution. That is society's recognition that the crime is so horrible that it demands the extreme penalty. The case of Gregg versus Georgia recognized that particular valid policy consideration, and said that it was a valid policy consideration. I believe the wording of the case was as follows, and I am quoting from the case of Gregg versus Georgia in which the United States Supreme Court upheld the death penalty:

(Reading): "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.["]

"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.["]

"Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

. . .

With reference to doing a higher duty and protecting society as opposed to the duty of rehabilitation, we would like to quote from a noted legal scholar in the 1800's. I think the Court is well aware of this particular passage:

(Reading): "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. This may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike, is

a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor victim whose blood cries out against his or her violators. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deeds occur. A stern, unbending, unflinching administration of the penal laws, as it is the highest mark of civilization, is also the surest mode to prevent the commission of offenses."

T. 1297-1301.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8481

JOSEPH WILSON, JR.,

Petitioner-Appellee,

v.

RALPH KEMP, Warden,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(November 18, 1985)

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

This appeal is from the district court's order granting habeas corpus relief to a state prisoner who has been convicted of murder and sentenced to death. We conclude that the prosecutorial argument at the sentencing phase of petitioner's trial rendered the proceeding fundamentally unfair in violation of the United States Constitution. Consequently, we affirm the grant of habeas corpus relief.

I. FACTS AND PRIOR PROCEEDINGS

Petitioner, Joseph Wilson, Jr., was convicted in a Georgia state court on August 16, 1979, of murder, kidnapping with bodily injury, and possession of a firearm during the commission of a crime. Wilson was sentenced for his

crimes to death, life imprisonment, and five years imprisonment respectively, with his sentences to be served concurrently. The evidence presented at Wilson's trial tended to show that Wilson killed a man who he believed had cheated him in a drug deal by shooting the man at point blank range with a shotgun. Wilson's convictions and sentences were affirmed on direct appeal, *Wilson v. State,* 246 Ga. 62, 268 S.E.2d 895 (1980), *cert. denied,* 449 U.S. 1103 (1981).

Wilson filed a petition for habeas corpus in the Superior Court of Butts County, Georgia. That court denied relief with respect to the murder and kidnapping convictions, but granted relief with respect to the firearms charge on the ground that this latter crime was a lesser-included offense of the murder charge. The Supreme Court of Georgia affirmed the state habeas court's denial of relief with respect to the murder and kidnapping convictions. *Wilson v. Zant,* 249 Ga. 373, 290 S.E.2d 442, *cert. denied,* 459 U.S. 1092 (1982). The state did not cross-appeal from the grant of habeas relief with respect to the firearms conviction.[1]

Wilson next filed the present habeas petition in federal district court, raising numerous constitutional challenges both with respect to the guilt/innocence phase and with respect to the sentencing phase of his trial. The district court rejected each of Wilson's challenges relating to the guilt/innocence phase of his trial, and Wilson has not appealed from this aspect of the district court's order. The district court granted sentencing relief on the basis of Wilson's prosecutorial argument challenge, but declined to reach Wilson's other arguments with respect to the sentencing phase of his trial. The state filed the present ap-

peal from the decision granting sentencing phase relief. Thus, the only substantive issue briefed or argued on the merits in this appeal is the issue concerning prosecutorial argument in the sentencing phase of Wilson's trial.

II. JURISDICTION TO HEAR APPEAL

Also pending before us is Wilson's motion to dismiss this appeal on the ground that the district court granted habeas relief without ruling on all of Wilson's claims for relief as to the sentencing phase. Wilson has cited this court's opinion in *Blake v. Zant,* 737 F.2d 925 (11th Cir. 1984), for authority that a district court order disposing of less than all of a petitioner's claims for habeas relief is not an appealable final decision. Subsequent to oral argument in the present appeal, however, the opinion in *Blake v. Zant* was vacated by the court, and the jurisdictional question was reconsidered in *Blake v. Kemp,* No. 81-7417 (11th Cir. Mar. 29, 1985). The court in this latter opinion ruled that a judgment *granting* the writ of habeas corpus on less than all grounds asserted is an appealable final decision within the meaning of 28 U.S.C.A. § 1291. *Id.,* slip op. at 3157-58. Wilson's petition comes within this rule of appealability since the district court granted habeas relief with respect to the sentencing phase of Wilson's trial. Consequently, we have jurisdiction to hear this appeal, and we proceed to consider the merits of the prosecutorial argument question.

III. THE CONSTITUTIONALITY OF THE PROSECUTOR'S CLOSING ARGUMENT

We have recently considered at length the standards to be applied by a federal habeas court in reviewing a

state prosecutor's closing argument. *See Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (en banc). A prosecutor's argument violates the Constitution if it renders the defendant's trial "so fundamentally unfair as to deny him due process." *Id.* at 1400 (quoting *Donelly v. DeChristoforo*, 416 U.S. 637, 645 (1974)). Improper argument by a prosecutor reaches this threshold of fundamental unfairness if it is "so egregious as to create a reasonable probability that the outcome was changed." *Id.* at 1403. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, — U.S. —, 80 L.Ed.2d 674, 698 (1984).

The methodology we have adopted for applying these constitutional standards is to determine first whether particular arguments by a prosecutor were improper and if so, to determine what the probable effect of the improper argument was on the jury. *See Brooks v. Kemp*, 762 F.2d at 1403. This approach recognizes that "a permissible argument, no matter how 'prejudicial' or 'persuasive,' can never be unconstitutional." *Id.* at 1403. We turn therefore to review the two parts of the prosecutor's closing argument that Wilson contends deprived him of due process at the sentencing phase of his trial.

A. *The Eberhart Quote*

In his closing argument, the prosecutor read a passage from a 19th Century Georgia case, *Eberhart v. State*, 47 Ga. 598, 609-10 (1873). The relevant portions of the closing argument, beginning with the prosecutor's introductory remarks, were as follows:

> With reference to doing a higher duty and protecting society as opposed to the duty of rehabilitation,

> we would like to quote from a noted legal scholar in the 1800's. I think the Court is well aware of this particular passage:
>
> (Reading): "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. This may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor victim whose blood cries out against his or her violators. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deeds occur. A stern, unbending, unflinching administration of the penal laws, as it is the highest mark of civilization, is also the surest mode to prevent the commisison of offenses."

Trial Transcript at 1300-01. The Supreme Court of Georgia has condemned use of this passage by prosecutors, *see, e.g., Hawes v. State,* 240 Ga. 327, 335-36, 240 S.E.2d 833, 840 (1977); *Ruffin v. State,* 243 Ga. 95, 252 S.E.2d 472, 479-80 (1979), but the Georgia court has generally considered the effect of the passage insufficient to warrant reversal of the sentences imposed. *See Ruffin v. State,* 243 Ga. at 105, 252 S.E.2d at 479-80.

We have twice considered whether it was proper for prosecutors to use the *Eberhart* quote in closing argument. In *Potts v. Zant,* 734 F.2d 526, 535-36 (11th Cir. 1984), we concluded that the passage may have misled the jury and that consequently its use was improper. Like-

wise, in *Drake v. Kemp,* 762 F.2d 1449. (11th Cir. 1985) (en banc), we concluded that use of the quote was "extremely improper." *Id.* at 1459. In each of these cases, the prosecutor attributed the remark to the Georgia Supreme Court, a fact that we emphasized in deciding that use of the quote was improper. In *Potts,* we said "the prosecutor was plainly attempting to suggest to the jury that prior decisions of the state supreme court mandated the imposition of the death penalty in this case, and this conduct was clearly improper." 734 F.2d at 536. In *Drake,* we said "the invocation of the Supreme Court of Georgia to abjure mercy is undeniably wrong." 762 F.2d at 1459. The prosecutor at Wilson's trial did not attribute the *Eberhart* quote to the Georgia Supreme Court, but introduced the passage as a quote "from a noted legal scholar in the 1800's." We must decide whether in light of this difference, the *Eberhart* language could properly be used in closing argument.

The clear import of the *Eberhart* language is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. § 17-10-2(c) (Michie 1982). Thus, as we held in *Drake,* the content of the *Eberhart* quote is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. *See, e.g., Woodson v. North Carolina,*

428 U.S. 280, 303 (1976) (striking down North Carolina's mandatory death statute for the reason, *inter alia,* that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The *Eberhart* quote, in strongly suggesting otherwise, misrepresents this important legal principle.

We conclude that since the *Eberhart* quote is not a correct representation of the law that controls capital sentencing, its use by the prosecutor in the sentencing phase of Wilson's trial was improper. This conclusion is based on the content of the *Eberhart* language and does not depend on the source to which the passage was attributed. We will consider in part IV of this opinion whether in the context of the entire trial, the improper use of the *Eberhart* quote rendered the sentencing phase of Wilson's trial fundamentally unfair, with due regard for the significance of attributing the quote to a source other than the Georgia Supreme Court.

B. *The Gregg v. Georgia Quote:*

The prosecutor also read before the jury a passage from the United States Supreme Court's opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976). We reproduce here the prosecutor's remarks leading into the quote, and the first part of the quote:

> We would like to call the Court's attention to what is generally considered among legal scholars, and anyone who had given much thought to the subject, to the four generally accepted reasons for punishment.
>
> The first is retribution. That is society's recognition that the crime is so horrible that it demands the extreme penalty. The case of Gregg versus Georgia recognized that particular valid policy consideration, and said that it was a valid policy consideration. I believe the wording of the case was as follows, and I am quoting from the case of Gregg versus Georgia, in which the United States Supreme Court upheld the death penalty:
>
> (Reading): "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.[2]

Trial Transcript at 1297-98.

As used by the prosecutor, the *Gregg* passage conveys the impression that "this function" —*i.e.*, capital punishment — is "essential in an ordered society." By contrast, the Supreme Court's intended meaning was quite different, as shown by a reading of the entire *Gregg* passage in context. The intended meaning was that recogni-

tion of the function of retribution is "essential in an ordered society."

In this habeas appeal, the state argues that taken in context, the prosecutor's closing argument made clear the true meaning of the *Gregg* quotation. The state would seem to contend that because it inserted the *Gregg* quotation into a general discussion of retribution, the jury would understand that the Supreme Court had reference to retribution and not to capital punishment when it said "this function . . . is essential in an ordered society." We find this reconstruction of how the argument would be received by the jury to be entirely unconvincing. The prosecutor characterized *Gregg* as the case "in which the United States Supreme Court upheld the death penalty" immediately before reading the quoted passage. This would tend to reinforce the conclusion that the Supreme Court was referring to capital punishment when it said "it is essential in an ordered society."

Aside from this, however, one need only read the relevant portion of the prosecutor's closing argument to appreciate its message: the United States Supreme Court has stated that in its view, capital punishment is essential in an ordered society. The fact that many states and countries do not have capital punishment and yet enjoy ordered societies belie this conclusion, which in any event has never been expressed by the Supreme Court. As indicated above, a review of the entire context of the *Gregg* opinion shows that this was not the Supreme Court's intended meaning.[3] Therefore, we conclude that the prosecutor's misleading use of the passage was improper argument, and we proceed to consider whether this argument,

and the use of the *Eberhart* passage discussed above, rendered the penalty phase of Wilson's trial fundamentally unfair.

IV. WHETHER THE IMPROPER ARGUMENTS RENDERED THE PENALTY PHASE FUNDAMENTALLY UNFAIR

We concluded in *Potts* and *Drake* that use of the *Eberhart* quote was highly prejudicial to the defendants in those cases. In *Potts,* we said that the passage may have misled the jury into believing it had a legal duty to return a death sentence, and that consequently the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires." 734 F.2d at 536. In *Drake,* we said that the content of the *Eberhart* quote was "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. In disparaging mercy, the passage "withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life." *Id.* at 1460. We further observed in *Drake* that the prejudice caused by the *Eberhart* quote "exceeded even its factually misleading and legally incorrect character because of the attribution to the Georgia Supreme Court," *id.* at 1460, but as we noted, "absent the attribution, the claim would have been severely prejudicial." *Id.* at 1460.

We conclude in the present case that use of the *Eberhart* quote was indeed highly prejudcial to Wilson because the clear import of the language used is that a juror should not be motivated by mercy in deciding whether to impose the death penalty. In misstating the law on this critical sentencing consideration, the passage

from *Eberhart* could likely have had a substantial effect on the jury's decision. By undermining mercy as a valid sentencing consideration, arguments such as those represented by the *Eberhart* quote strike at the most important component of a capital jury's discretion favoring capital defendants.

This effect cannot be entirely discounted just because the derogation of mercy is attributed to a "noted legal scholar" rather than to the Georgia Supreme Court. Either source would likely carry weight with laymen and influence their decision. In fact the attribution was to a passage by a noted legal scholar, which the prosecutor said was well known to the trial judge, thus adding additional status to the attribution. However, if the *Eberhart* language were simply presented by the prosecutor, unbolstered by any attribution, it would still cause us great concern because of its tendency to mislead the jury about the proper scope of its deliberations.

In this regard, the argument represented by *Eberhart* is significantly different from a prosecutor's legitimate plea in any particular case that the jury not extend mercy. The latter argument, which would properly arise from the facts in evidence and the character and history of the particular defendant, leaves the jury free to decide for itself whether to grant mercy. But when the prosecutor argues that it is mercy itself that is inappropriate, the jury is improperly told that the concept of mercy — the most significant factor which might point toward a choice of life imprisonment — is illegitimate.[4]

We turn next to evaluate the prejudicial effect of the prosecutor's use of a passage from *Gregg v. Georgia* out

of context. We concluded in Section III.B. of this opinion that the passage as quoted tended to attribute to the Supreme Court the opinion that capital punishment is essential in an ordered society. We need hardly belabor the point that this incorrect report of Supreme Court precedent is highly prejudicial to a capital defendant. While the Supreme Court has decided that a state's decision to implement a capital punishment scheme does not violate the United States Constitution, *see Gregg v. Georgia,* 428 U.S. 153 (1976), the Court has not been called upon to endorse capital punishment. The prosecutor's selective quotation from *Gregg* told the jury not only that the Supreme Court endorses capital punishment, but also that the Supreme Court views capital punishment as essential in an ordered society. This placed the weight of opinion from the nation's highest judicial officers on the side of imposing the death penalty. The prejudicial effect was thus similar to that found in *Drake,* which "exceeded even [the *Eberhart* quote's] factually misleading and legally incorrect character because of the attribution to the Georgia Supreme Court." 762 F.2d at 1403.

We need not address the effect of either argument alone. However, the combined effect of the *Eberhart* quote and the *Gregg* quote is highly prejudicial. On the one hand, the jury was told that the basic rationale for a sentence of life imprisonment —*i.e.,* mercy — was an invalid consideration to inform their decision. On the other hand, the jury was told that its other choice — *i.e.,* the death penalty — had been endorsed by this nation's highest court as "essential in an ordered society." These two improper and highly prejudicial arguments by the prosecutor undermine our confidence in the result that was

reached by the jury in the sentencing phase of Wilson's trial. The improper argument was "so egregious as to create a reasonable probability that the outcome was changed." *Brooks v. Kemp,* 762 F.2d at 1403.

The prosecutorial argument at issue here presents at least as strong a case for habeas relief as the argument condemned by the Supreme Court in the recent case of *Caldwell v. Mississippi,* — U.S. —, 53 U.S.L.W. 4743 (June 11, 1985). In *Caldwell,* the prosecutor told the jury in closing argument that the jury's sentencing decision was "not the final decision," and that its "job [was] reviewable." *Id.* at —, 53 U.S.L.W. at 4744. The Court stated that the prosecutor's comments, left uncorrected, "might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." *Id.* at —, 53 U.S.L.W. at 4748.

Similarly in *Drake, supra,* we noted that the *Eberhart* passage, identical to the one quoted in the present case, "pre-dated the contemporary judicial effort to guide capital sentencing by principles drawn from the Eighth Amendment's protection against cruel and unusual punishment." 762 F.2d at 1459. We considered the *Eberhart* language to be "fundamentally opposed to current death penalty jurisprudence," and we concluded that the prosecutor's use of the passage struck at "the core of the jury's role in capital sentencing." *Id.* at 1460.

When core Eighth Amendment concerns are substantially impinged upon, as they were in *Drake* by the prosecutor's use of *Eberhart* to disparage mercy, and as they were in *Caldwell* by the prosecutor's suggestion to the jury that ultimate sentencing responsibility rested with

appellate courts, it is understandable that confidence in the jury's decision will be undermined. *See Brooks v. Kemp*, 762 F.2d at 1402 n.28 (the undermining confidence/reasonable probability test adopted in *Brooks* "is consistent with the need for high reliability in imposition of the penalty. *See Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Justice Brennan's partial concurrence demonstrates that the application of the test in capital cases must be guided by that concern for reliability. — U.S. at —.").

Our confidence in the sentencing decision in this case has been undermined by the prosecutorial argument in the sentencing phase. We conclude that the sentencing phase was fundamentally unfair. For the foregoing reasons, the district court's order granting habeas corpus relief with respect to the sentence is

AFFIRMED.

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[1] Although the state did not cross-appeal from this ruling, the Supreme Court of Georgia stated its view that the firearms charge was not a lesser-included offense of the murder charge. *See* 249 Ga. at 380, 290 S.E.2d at 448-49.

[2] The remainder of the prosecutor's quotation from *Gregg v. Georgia* was as follows:

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

> "Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

Trial Transcript at 1298-99.

[3] We need not address the issue of whether or not it would have been proper for the prosecutor to argue the correct meaning of the Supreme Court language—*i.e.*, that recognition of the retribution function is essential in an ordered society. We note only the truism that everything said in a judicial opinion is not necessarily relevant to a jury's deliberations.

[4] We think that the instant argument is more prejudicial than that in *Bowen v. Kemp*, — F.2d — (11th Cir. 1985). The argument in *Bowen* was "a more limited, if not rather garbled, version," id. at — n.5, of the argument condemned by this court in *Drake*. Significantly, the primary thrust of the remarks in *Bowen* was that society and justice require a proper punishment and that mercy is two-sided and should consider not only the defendant, but also society: "Here, no mention was made of mercy, except that society occasionally should be the object of mercy, as well as a criminal defendant." Id. Of course, it is not improper to argue that justice requires a proper punishment and consideration of the appropriate needs of society as well as the criminal defendant. By contrast, the pernicious aspect of the *Eberhart* quotation, used verbatim by both the prosecutor in *Drake* and the prosecutor in this case, was communicating to the jury the idea that mercy for capital defendants was inappropriate. Like the *Bowen* panel, we conclude that the remarks in *Drake* and in this case are a "much more severe statement concerning the appropriateness of mercy for a capital crime defendant, and therefore much more prejudicial than the inarticulate argument" in *Bowen*. Id.

TJOFLAT, Circuit Judge, specially concurring:

I would dismiss this appeal for want of a final judgment; the district court's dispositive order, granting a portion of the habeas relief petitioned requested, did not dispose of all of petitioner's claims. My view that we must dismiss an appeal from a partial final judgment (absent Fed. R. Civ. P. 54(b) certification) in a habeas corpus case, however, has been rejected by this court. Blake v. Kemp, 758 F.2d 523, 535-543 (1985) (Tjoflat, J., dissenting). Blake instructs that we entertain this appeal. Doing so, I concur in Judge Anderson's treatment of the merits of petitioner's claim that the prosecutor's closing argument rendered the sentencing phase of his jury trial fundamentally unfair.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8481

JOSEPH WILSON, JR.,

Petitioner-Appellee,

versus

RALPH KEMP, Warden,

Respondent—Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 18, 1985, 11 Cir., 198—, —F.2d —).

(February 10, 1986)

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

REHG-6
(Rev. 6/82)

APPENDIX D

CLOSING ARGUMENT — STATE

MR. MILLS: Your Honor, counsel for the defense, gentlemen of the jury. In as much as the ultimate duty for passing sentence in this case evolves upon the Court, that is the Judge sitting upon the bench, I will address my opening remarks to the Court concerning the death penalty in general.

As the Court is well aware, in June of 1972, the Georgia death penalty, as well as that of the rest of the nation, was struck down by Furman versus Georgia, a United States Supreme Court case. Since that time 35 states, and congress, have recognized the validity of the death penalty as a sanction against violent crimes, by re-enacting the death penalty statutes with the idea behind them that they would correct any flaws that were in the original death penalty statutes, and the procedures that were in the original death penalty statutes struck down by Furman versus Georgia.

On July the 2nd, 1976, the United States Supreme Court recognized that the Georgia Death Penalty does provide sufficient procedural protections and guidelines for the jury, to insure against an arbitrary return of the death penalty verdict, that is a verdict that would be based on passion, prejudice, discrimination, or any other type of arbitrary factors.

The death penalty is only valid for certain policy considerations enacted by these statutes. First of all, Georgia's Death Penalty Statutes, as the Court is well aware of, provides that only the most horrible crimes are

punishable by death. that is kidnapping with bodily injury, murder, rape, armed robbery, and cases in which the victim actually is killed. It is not eligible for any other type of case.

Secondly, Georgia's Statutes provides for a bifurcated trial procedure. That is a two-part trial. The first part of the trial deals with only the issue of guilt; whether or not the defendant is guilty. During that phase of the trial the jury is not made aware of the character of the defendant. The second part of the trial is that of punishment, in which all of the facts and circumstances surrounding the defendant, his character, aggravating circumstances, mitigating circumstances, are made known to the jury so that the jury is well aware of the entire character of the defendant and can adequately determine what sentence is proper, based on recognized valid policy considerations.

Thirdly, the General Assembly of Georgia, as approved by the United States Supreme Court, has set forth 10 Statutory Aggravating Circumstances, and only in cases where one of those statutory aggravating circumstances are present may the State ask for the death penalty.

The General Assembly has recognized under some circumstances the death penalty is a valid penalty, and it is only under one of those particular statutory aggravating circumstances.

In this particular case where the offense of murder, or one capital felony is committed during the commission of another capital felony, the general assembly of Georgia has recognized that that is one of the circumstances under which the death penalty may be asked for.

We would like to call the Court's attention to what is generally considered among legal scholars, and anyone who had given much thought to the subject, to the four generally accepted reasons for punishment.

The first is retribution. That is society's recognition that the crime is so horrible that it demands the extreme penalty. The case of Gregg versus Georgia recognized that particular valid policy consideration, and said that it was a valid policy consideration. I believe the wording of the case was as follows, and I am quoting from the case of Gregg versus Georgia, in which the United States Supreme Court upheld the death penalty:

> (Reading): "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.
>
> "Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."

The second school of thought — retribution being the first, — is one of deterrents. That is, by showing other criminals, by this particular defendant, that like crimes will be similarly punished. As the Court is well aware, a deterrent relys on two factors. the swiftness and the certainty of the punishment. In this particular case the certainty of punishment, that being the death penalty, showing other criminals that if they commit like crimes, that is kidnapping with bodily injury in which a murder is committed, they will also receive the death penalty.

If this certainty of punishment is not there then there is no deterrent value to the death penalty. It is useless.

The third school of thought is one of removal. That is, one of the policy considerations for imposing any type of sentence, whether it be the death sentence or otherwise, is removal from society. We would submit in this particular case the evidence has shown that he already, through one of the State's exhibits, has a tendency to want to escape. He may be removed from our society, but he will be in prison, where he would be a danger to the prison guards, and where there is always the probability of the possibility that he will escape.

I would like to remind the Court of the well-publicized case involving the deaths in the Allday family involving Mr. Issac and Mr. Coleman, in which those defendants were on escape at the time that they massacred an entire family.

There is finally the issue of rehabilitation. We would submit in this particular case the evidence proves that rehabilitation is not a valid policy consideration with reference to Mr. Joseph "Joey" Wilson. He is a three-time

loser. He had been out of jail for six months when he got into not just trouble, but a murder case. He has eliminated another human being.

We would submit that there is a higher duty in this particular case, not to rehabilitate, but to insure that justice is done and thereby protect society.

With reference to doing a higher duty and protecting society as opposed to the duty of rehabilitation, we would like to quote from a noted legal scholar in the 1800's. I think the Court is well aware of this particular passage:

> (Reading): "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. This may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike, is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal, but we must insist upon mercy to society, upon justice to the poor victim whose blood cries out against his or her violators. That criminals go unpunished is a disgrace to our civilization, and we have reaped the fruits of it in the frequency in which bloody deeds occur. A stern, unbending unflinching administration of the penal laws, as it is the highest mark of civilization, is also the surest mode to prevent the commission of offenses."
>
> Thank you, Your Honor.

I would like to address these final remarks to the jury. It will now evolve upon you to make a decision as to what punishment is proper in this particular case. You should not do so based on passion, prejudice, any arbitrary fac-

tors, but you should do so only in your minds after a careful analysis of the case, and the reasons for asking for the death penalty in this particular case.

Whether or not death or life is the proper punishment is for you to decide.

I am going to first touch on what procedure you will follow, and I think that the Court will give you further instructions as to that. As I have stated to the Court, there are only certain circumstances in which we can ask for the death penalty. One is when there was one capital crime committed during the commission of another capital crime. The Court will instruct you that where murder, which is a capital crime, is committed during the commission of another capital crime, in this particular case, kidnapping with bodily injury, the death penalty is authorized.

Now you, by your verdict, have already decided that in fact he did commit the offense of murder, and that in fact he did commit the offense of murder while in the commisison of another capital felony, that being the kidnapping with bodily injury of George A. Knox.

So, by your verdict you have said that the death penalty is authorized. The question now is, is it the proper punishment? Even should you believe that it is authorized, that is, under the law it can be given, you still have the discretion in which to determine whether or not the death penalty is the proper punishment in the case.

You will be given a form in which you determine whether death or life is the proper punishment. You will have to write in death or life. Should you find that death

is the proper punishment, then you must also write in the particular statutory aggravating circumstance in full. You will be given written instructions on this. That is, the form of your verdict would be to write in death, and you would also write in: "We further find that the offense of murder was committed during the commission of another capital felony, that is, the kidnapping with bodily injury of George A. Knox."

Now I want to touch on something that has been touched on by the defense, and I anticipated that it would be. As I have said, there are certain valid recognized policy considerations in which the death penalty should and should not be imposed, and things of this nature.

I want to point out to you what is not a valid policy consideration. That is the argument of the defense in this particular case, that will sentencing "Joey" Wilson to death bring back George A. Knox? That's not a valid policy consideration. If that were a valid argument, then you could follow that to its logical conclusion and that is, will sending him to prison for life bring back George A. Knox? No, it won't, and that is not a valid policy consideration. That is a false policy consideration. It is one that asks for a passionate response from the jury, and not an analytical response from the jury.

I am asking you to be analytical in this case. This hasn't been a very emotional case, although a man's life has been obliterated. So, I am asking you to be analytical and determine whether or not death is a proper punishment in this case.

I want you to look at certain factors concerning this case, and what it consisted of, and what it involved. I

want you to look at first this factor. Joseph "Joey" Wilson, Jr. believed in the death penalty because he administered it himself. He annihilated a human being without a trial. We are asking you to impose a penalty of death after a full trial in which he was afforded every right possible. The best defense affordable in Forsyth County. Two extremely competent attorneys and a private investigator.

"Joey" Wilson killed an innocent man. At least for the purposes of this trial. He may have been a doper, but he is still a human being. He hadn't been adjudged guilty by anyone, other than "Joey" Wilson, in a double cross.

We are asking you to return a verdict of death of a man that you have already determined to be guilty of a most heinous crime. I want you to keep this in mind in a case of this nature where we are asking for the extreme penalty. In this particular case "Joey" Wilson will be afforded the opportunity to prepare, if he so desires — and it has come up in this case — to meet his maker. He will have the counsel of a Priest, or a preacher, or anyone of his desire before he is executed. I will ask you what opportunity did George A. Knox have to prepare to meet his maker?

He was brutally butchered at pointblank by a shotgun. "Joey" Wilson killed a defenseless person, a man that had nothing to protect himself with. George Knox had no weapons, no one to help him. He was in his last hour completely by himself. "Joey" Wilson had every right afforded to him by law, by society.

We have talked a lot about rights in this case. The right to remain silent and things of this nature. "Joey"

Wilson had lots of rights, but I will tell you this, George A. Knox had rights too. He had the right to live. He had the right to work and breathe and marry and raise a family. He was a human being. He was an employed human being, and he probably paid taxes. He may have been a doper. I don't know, but he was annihilated as an expedient. I want you to just recall the evidence in this particular case, and I am not going to dwell on it. As he now contends the evidence to be.

If you will recall, during the early part of the trial he contended that Patty Johnson was lying about certain things, and that his relatives were lying about certain things. But that story didn't ring true. There were certain things about it that just didn't ring true. You knew they weren't right, and you determined that they weren't right by returning a verdict of guilty.

I am going to ask you to analyze his new story. There is not a lot of levity in this case, but it sounds kind of like Maxwell Smart on Get Smart, the TV program where he would say something, and somebody would do something else, and then he would say: "Would you believe. . ."

He has changed his story but even while he was on the stand he began to change it some more, during the sentencing portion of this trial. He is telling you half truths again, just as his father told you a half truth concerning the destruction of that weapon. He destroyed the weapon, but it was after the murder, not before.

I submit to you that "Joey" Wilson is telling you half truths even now. There may have been a man by the name of "Hurst" involved in this case, but he is trying

to put it all on him, and take it all off of himself. He has already told you that he is an accomplished liar. He is lying again.

The story doesn't ring true? Why would Mr. Hurst have called Patty Johnson and told her to get that jacket out of there. There wasn't but one man concerned with getting that jacket out of there. Mr. Hurst wasn't connected to the apartment, and "Joey" Wilson was, because he had been there. He is the one that called back, and the only reason that he could have called back is because he knew that he was dead, whether he pulled the trigger or not.

There may have been a "Hurst" involved and some of the story has a ring of truth to it. That explains what the word "keys" means. There is probably a little bit of truth to it. I don't know. But this doesn't make "Joey" Wilson not guilty of murder for this offense, or any less culpable of the death of George A. Knox.

I want you to think of this case in terms of the four recognized reasons for punishment: One, as I cited to the Court; retribution. This crime is so horrible that it demands the extreme penalty, period, with no other justification or reason for it. The United States Supreme Court has said that that is a valid reason for asking for the death penalty. Secondly, deterrents. Think about it in terms of this. We are talking about one capital felony committed during the commission of another capital felony.

If "Joey" Wilson commits the offense, or anyone else, commits the offense of kidnapping, he stands to suffer life imprisonment. If there is no death penalty, then

he would suffer no greater penalty for killing the man than he would for letting him go. A man who commits an armed robbery, a rape, a kidnapping, or murder, which has witnesses to it, would be an absolute fool not to kill the witnesses unless there is a death penalty.

The only value in deterrents is the swiftness and certainty of punishment. The certainty that if you commit a capital felony and then commit another capital felony, you are going to get the extreme penalty. That is the only protection for you, me, or any other potential victim of a capital felony.

The third is removal and I have already touched on that. Whether or not putting "Joey" Wilson in prison for "life" is a sufficient removal of him from society? Look at State's Exhibit "C". You will have it out with you. I am sorry. That is State's Exhibit "B". That is the escape case.

Look at State's Exhibit "C". That is a dynamiting case. He is a violent man. He is like a cocked gun, pointing at you, and at me, and at every other member of society who crosses his path, or double crosses him. Putting him in prison for life is not a sufficient removal of this man from society.

I want you to remember during your deliberations as to what the proper punishment should be in this case, the words of State's Counsel in the Case of Gregg versus Georgia, when they argued before the United States Supreme Court, in which case the death penalty was upheld after some period of time. I want you to remember this before we get into that:

> (Reading): "There have been those who have said that deterrents statistically can't be supported. That there is no statistics that will tell anyone that deterrents is a valid policy consideration."

I submit to you that you can't prove a negative factor. You don't know how many people went into a liquor store, or went into a gas station to rob. We don't know how many rapes were committed in which that defendant had to decide whether to kill that witness or not, where he didn't because of fear of the death penalty.

What we do know is that during the 10 years in which there was no death penalty, there has been an explosion of violent crime. Deterrents is absolutely necessary. Swiftness and certainty of punishment is absolutely necessary.

I will also ask you to remember the words of State's counsel in the case of Gregg versus Georgia, and that is essentially:

> (Reading): If there is true reverence for human life, you must be as at least concerned with the innocent victims of crime as for the defendants who have been convicted of crimes. Far too often a defendant is looked upon with pity, as being the object of pity; victims of circumstances beyond their control. We must not let pity misguide us into disregard for the victims of capital felons and their future victims."

I submit to you, don't turn "Joey" Wilson loose on any future victims. The only punishment in this particular case, the proper punishment after an analytical decision, is death.

Thank you.

EDITOR'S NOTE

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No. 85-1646

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

-v-

JOSEPH WILSON, JR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITIONER'S PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE ARGUMENT OF THE PROSECUTOR RESULTED IN A FUNDAMENTALLY UNFAIR SENTENCING TRIAL.

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STATEMENT OF THE CASE

(i) Procedural History

The procedural history of this case is amply set out in the Petition for Writ of Certiorari and is adopted by Respondent.

(ii) Statement of Facts

The facts relevant to the single issue presented will be incorporated into the argument on that issue.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE ARGUMENT OF THE PROSECUTOR RESULTED IN A FUNDAMENTALLY UNFAIR SENTENCING TRIAL.

Petitioner-Warden contends that the Court of Appeals has mistakenly concluded that the long prohibited jury argument, given by the prosecutor in the sentencing phase of this capital trial, did not render that phase of the trial fundamentally un-

fair.

Judge Anderson writing for the panel definitively and emphatically disposed of the Warden's contentions in several ways.

First, he noted that the Georgia Supreme Court itself has condemned the argument since 1977. Wilson v. Kemp, 777 F.2d 621, 623 (11th Cir. 1985). Further, several panels of the Eleventh Circuit, as well as the en banc court, have similarly condemned the argument. See, Potts v. Zant, 734 F.2d 526, 535-36 (11th Cir. 1982, cert. denied sub nom, Kemp v. Potts, ___ U.S. ___, 106 S.Ct. 1386 (1986); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(en banc).

Finally, in discussing the quoted argument, Judge Anderson noted that:

> (a) The "clear import of the [quoted] language is that a sense of mercy should not dissuade one from punishing criminals to the maximum";
>
> (b) That "this position of mercy is dramatically opposed to the Georgia death penalty statute . . .";
>
> (c) The quote "misrepresents" the important legal principles, found in this Court's prior precedents, of consideration of any individual mitigating factors.

Judge Anderson concluded that the argument

> is not a correct representation of the law that controls capital sentencing, and its use by the prosecutor in the capital sentencing phase of Wilson's trial was improper.

Finding the argument improper, the panel next determined that its use was "indeed highly prejudicial" by eliminating mercy from the jury's consideration of penalty. It was "significantly different" from a proper argument because it eliminates mercy - "the most significant factor which might point toward a choice of life imprisonment." Contrary to the contentions of the Warden, Judge Anderson properly considered both Donnelly v. DeChristoforo, 416 U.S. 637 (1974)(Id. at 623) and Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985)(Id. at 627).

Judge Anderson noted that the argument here impinged upon

"core Eighth Amendment concerns," thus undermining confidence in the jury's decision. This "pernicious" practice simply cannot be condoned, and this Court should reject the Warden's request for a grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner-Warden's Petition for Writ of Certiorari.

Respectfully submitted,

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